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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW BERNARD CLAYTON, Defendant and Appellant.	A104581 (Marin County Super. Ct. No. SC112594)

Andrew Bernard Clayton appeals his jury-trial conviction for first degree murder and other offenses. Appellant contends the trial court erred by excluding prior statements of an unavailable witness and by denying his motion to suppress evidence. We affirm.

BACKGROUND

Appellant was accused of the following crimes on or about January 22, 2000: murder of Christopher Deming; attempted residential robbery; residential burglary; and possession for sale of a controlled substance (methamphetamine). The Information also alleged appellant committed the murder while engaged in robbery and burglary; discharged a firearm; personally used a firearm; and personally inflicted great bodily injury on Deming.

The People began its case-in-chief on May 12, 2003. The trial court instructed the jury on June 23, 2003, and the jury began deliberations after closing arguments on June 25, 2003. The jury returned its verdicts on July 1, 2003, finding appellant guilty on counts 1 through 3, and not guilty on count 4 (the drug charge). The jury also found true

the allegations appellant personally used a firearm but deadlocked on the remaining allegations; the trial court declared a mistrial as to those allegations on which the jury deadlocked. On September 12, 2003, the trial court sentenced appellant to a prison term of 35 years-to-life. The abstract of Judgment was filed on September 17, 2003, and appellant timely filed a Notice of Appeal on November 4, 2003.

Appellant committed the murder of Christopher Deming during a botched, drug-related robbery. The train of events began on January 21, 2000 at around 10 p.m. Appellant, his girlfriend Gretchen Babineaux, Richard Calkins, and George Minaidis were at Minaidis's car repair shop in Novato when Babineaux received a cell phone call from Don Phillips. Phillips said Matt Cady and Christopher Deming had left him in Las Vegas after stealing a quantity of methamphetamine from him. Appellant, Babineaux, Calkins and Minaidis devised a plan to go to Cady's house and get the methamphetamine. It was decided Minaidis would not go to Cady's house because Cady might recognize him, but he would stay in the area in case the others needed help. Appellant and Calkins armed themselves with handguns at appellant's house. They first washed the guns and bullets, taped their fingers, put on rubber gloves, stocking masks, and extra layers of clothing. Appellant and Calkins went together in Calkin's vehicle and Babineux followed in appellant's truck.

When they got to Cady's house, appellant and Calkins approached the shed Cady used for his drug business. Inside the shed were Cady, Deming, and Paris Stephens. The occupants of the shed were alerted to the presence of intruders by a sensor light inside the shed. Deming opened the door and was confronted by Calkins and appellant. As Calkins struggled with Deming, appellant fired a single gunshot into Deming's upper torso, then fled the scene. Cady grabbed a baseball bat and beat Calkins with it. Calkins fled on foot and was later apprehended near the scene. Police were dispatched to the Cady residence after receiving a report of an armed intruder. Deming was taken to Novato Community Hospital where he was later pronounced dead. Appellant was arrested in a trailer parked on his parents' property after police searched the house looking for him. Calkins testified

for the prosecution at appellant's trial pursuant to a plea agreement, under which he pleaded guilty to voluntary manslaughter and received a sentence of 28 years.

DISCUSSION

I Exclusion of Prior Statement of Unavailable Witness

A. Background

During trial, on May 29, 2003, Deputy District Attorney Frugoli and investigator Harold Hutchinson contacted Calkins at the Marin County Jail. Calkins told them he had spoken briefly with an inmate, who in turn had spoken with another inmate known as "Helicopter Paul." "Helicopter Paul" told the inmate he had spoken with George Minaidis, and Minaidis stated he [Minaidis] was the shooter. Hutchinson later called the jail and determined "Helicopter Paul" was Paul Outcalt, currently housed in pod C at the jail. On May 30, 2003, Frugoli and Hutchinson returned to the jail to interview Outcalt.

Outcalt stated appellant was his supervisor at Kelleher Lumber. Outcalt said he previously had been housed with appellant in pod C, appellant was his "Big Brother" in the pod, but appellant had never discussed his case with Outcalt. Also, Outcalt stated he did not know Calkins was testifying against appellant at trial. Regarding Minaidis' admission, Outcalt stated he had known Minaidis all his life and at one time helped him move shop. Minaidis got annoyed about something and accused Outcalt of being weak. In his anger, Minaidis said words to the effect he had "killed that guy" and was there on the night of the murder. Outcalt told Minaidis he didn't want to hear about it, and Minaidis said nothing more. Also, Outcalt stated that at the time of this incident he was using a lot of dope; hence his mind was not clear about a lot of things.

On May 31, 2003, Frugoli and Hutchinson talked to Calkins again. They asked Calkins how he knew about Outcalt and Minaidis. Calkins said a pod mate named John Bixler was in a holding cell with Outcalt on the day after the trial began. During a conversation about appellant's case, Outcalt told Bixler he didn't know why Calkins was testifying against appellant because Minaidis admitted he shot Chris Deming. On June 2, 2003, defense investigator Denise Garety interviewed Outcalt. Outcalt told Garety Minaidis admitted shooting Deming when Outcalt helped Minaidis to move shop in the

winter of 2000. Outcalt stated he did not tell anyone about Minaidis' admission until some years later when he was in a holding cell with Bixler and Bixler told him Calkins was going to testify against appellant. When Outcalt heard this, he said: "that's bullshit because George Minaidis told me he shot Chris."

The court conducted a hearing pursuant to Evidence Code 402 to determine the admissibility of any testimony Outcalt might offer. The counsel appointed for Outcalt opined Outcalt was not entitled to assert a Fifth Amendment right not to testify. Outcalt testified he had a conversation with Minaidis about the Deming murder. However, Outcalt refused to respond to any other questions on the matter, even after the trial court cited him for contempt of court and ordered he not receive any credits against his sentence while held in contempt. Outcalt was brought back to court on several other occasions; each time he refused to testify.

On June 19, 2003, appellant filed a motion in the trial court to admit statements made by Outcalt. On the same day, the trial court again ordered Outcalt to testify, but he again refused. The trial court ruled Outcalt was an unavailable witness and heard argument on the admissibility of his statements. The trial court found the circumstances surrounding Minaidis' statement to Outcalt were ambiguous because it was "some form of bluster that didn't impress, concern or frighten him [Outcalt], and in circumstances where Minaidis seems to have been frustrated and angered about something Outcalt says he couldn't figure out." The trial court noted Outcalt "reported both that Minaidis said he killed that guy, but also said that he was there the night the guy was killed, whatever the heck that means. It is obviously garbled." Further, the trial court concluded: "In any event, if you accept that, and I am not sure it's entirely clear that the Minaidis statement is sufficiently against penal interests to assure credibility, it appears to me that there is no statement of Mr. Outcalt which is sufficiently clearly against his interest to offer any assurance of credibility which would justify it being presented without cross-examination to the jury." In addition, the trial court found Outcalt's statement was unreliable because appellant was Outcalt's benefactor in the jail, Outcalt's report of the Minaidis statement was remote in time to the purported event, Outcalt's justification for the delay in

reporting Minaidis' statement lacked credibility, and appellant and Outcalt lived together in C pod in 2001 for over two months. Moreover, the trial court concluded Outcalt's continued refusal to testify under oath, even after he was told his statements were public knowledge, suggested he "is concerned about being prosecuted now for making a false statement or for perjury, which he might end up doing if he were to testify." For all these reasons, the trial court ruled Outcalt's "hearsay statements are thoroughly unreliable and should not be introduced as a source of little more than confusion in this trial."

B. Analysis

Appellant does not contest the trial court's ruling that Outcalt's statements were not against interest and were otherwise unreliable. Indeed appellant concedes this ruling is "unassailable" under *In re Weber* (1974) 11 Cal.3d 703.[1] Rather, appellant contends the exclusion of Outcalt's statements violated his due process rights under the Fourteenth Amendment of the U.S. Constitution. Appellant relies on the principle, announced by the high court in *Chambers v. Mississippi* (1973) 410 U.S. 284 (*Chambers*), that due process does not allow directly exculpatory evidence to be excluded by an overly technical application of the hearsay rule. However, no such due process concerns exist here.

We first consider *Chambers*. Leon Chambers was tried and convicted of shooting a policeman from a hostile crowd of people who had gathered after police tried to execute an arrest warrant on a local youth. (*Chambers*, *supra*, 410 U.S. at p. 285-287.) Before Chambers' trial, another individual who had been in the crowd, Gable McDonald, gave a written confession to Chambers' counsel stating he shot the officer: McDonald stated he had already told a friend, James Williams, he shot the officer, and that he used his own

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[1] There, the court held "[n]othing in the content of Anderson's statement reflects adversely on his character in such a way as to guarantee that it is reliable[]" where Anderson stated another individual committed perjury to frame Weber. (*In re Weber*, *supra*, 11 Cal.3d at pp. 721-722.) Therefore, even though Anderson was unavailable as a witness, his statement was not admissible as a statement against interest under section 1230 of the Evidence Code on the grounds he would be viewed as a "snitch" in the prison community, because "both the content of the statement *and* the fact the statement was made must be against the declarant's social interest." (*Id.* at p. 722 [italics added].)

nine-shot, .22-caliber revolver, which he discarded after the shooting. (*Id.* at p. 287.) McDonald was arrested for the crime, but was released from custody after he repudiated his confession at a preliminary hearing. (*Id.* at p. 288). At his trial, Chambers tried to present a defense that McDonald committed the murder. But Chambers was thwarted in this effort by a "combination of Mississippi's 'party witness' or 'voucher' rule and its hearsay rule[.]" (*Id.* at p. 294.) First, "petitioner's request to cross-examine McDonald was denied on the basis of a Mississippi common-law rule that a party may not impeach his own witness. The rule rests on the presumption--without regard to the circumstances of the particular case--that a party who calls a witness 'vouches for his credibility.'" (*Id.* at p. 295.) Second, not only was Chambers precluded from cross-examining McDonald, but "he was also restricted in the scope of his direct examination by the rule's corollary requirement that the party calling the witness is bound by anything he might say. He was, therefore, effectively prevented from exploring the circumstances of McDonald's three prior oral confessions and from challenging the renunciation of the written confession." (*Id.* at pp. 296-297.) Third, Mississippi did not recognize declarations against penal interest as an exception to the hearsay rule (it only recognized declarations against pecuniary interest), meaning Chambers was not allowed to call three witnesses who could testify McDonald named himself as the murderer on three separate occasions shortly after the crime. (See *id.* at p. 288.) "In these circumstances," the high court concluded, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Id.* at p. 302.)

Unlike in *Chambers*, the trial court here did not mechanistically apply the hearsay rule to exclude otherwise reliable testimony, nor does appellant's claim "rest[] on the cumulative effect of [] rulings in frustrating his efforts to develop an exculpatory defense." (*Chambers, supra,* 410 U.S. at p. 290.) In *Chambers*, McDonald testified he did not shoot the policeman, and was permitted to explain to the jury why he initially confessed to the crime but later withdrew the confession, yet Chambers was not allowed to cross-examine McDonald on account of Mississippi's "arcane" 'voucher' rule. (See

id. at p. 297 fn. 8.) Here, Outcalt did not even testify. More importantly, the high court concluded the hearsay statements Chambers sought to introduce "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." (*Id.* at p. 300.) This was because each of McDonald's confessions was "made spontaneously to a close acquaintance shortly after the murder had occurred[,] . . . each one was corroborated by some other evidence in the case[,] . . . [and] each confession [] was in a very real sense self-incriminatory and unquestionably against interest." (*Id.* at pp. 300-301.) In stark contrast here, Outcalt reported Minaidis' alleged statement almost three years later, and, even if Minaidis made such a statement, it was not made spontaneously to Outcalt shortly after the crime but months later. Moreover, no corroboration existed for Outcalt's claim Minaidis admitted to the shooting. In addition, Outcalt's statement was thoroughly unreliable for all the reasons outlined by the trial court. Last, as the trial court noted, Minaidis's alleged statement was made under circumstances which throw into question whether it was "unquestionably against [his penal] interest." (*Ibid.*) In sum, we reject appellant's contention the trial court violated his due process rights by excluding Outcalt's hearsay statements.[2]

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[2] At oral argument, appellant discussed at length the "Miller factors" in pressing his Sixth Amendment claim. (See *Miller v. Stagner* (9th Cir.1985) 757 F.2d 988, 994 (*Miller*) [describing balancing test to be applied in federal habeas proceeding to determine whether the exclusion of evidence in the state trial court violated habeas petitioner's due process rights].) *Miller* is not binding here. First, this is not a habeas case. Second, *Miller* does not even discuss *Chambers, supra,* but is concerned with exclusion of evidence following prosecutorial misconduct. Third, decisions of the district courts of appeal on federal law are not binding on this court. (*People v. Williams* (1997) 16 Cal.4th 153, 190.) Under egregious facts, *Chambers, supra,* held where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice—the record wholly fails to support such a claim here.

II Denial of Motion to Suppress

A. Facts

Police were dispatched to Matt Cady's house on Indian Valley Road in Novato shortly before 4:00 a.m. on January 22, 2000, after a report of a shooting there. At the suppression hearing,[3] Marin County Sheriff Deputy Blair Benzler stated he reported to the scene at around 4:00 a.m. and initially assisted in the search for suspects. Around 5:25 a.m., Benzler was instructed to go to 201 Adams Street and look for a gray Ford truck license number 5T93592 belonging to appellant because he was a suspect in the case. Benzler parked and observed the area for a few minutes. Then he approached the driveway, saw the gray Ford truck, verified the license plate, and felt under the engine to see if it was warm. The vehicle was warm, indicating it had been running recently. Benzler phoned Sergeant Chapman and told him the truck was at the house. Chapman instructed Benzler to stay there and watch the house. Benzler heard someone moving around in the yard of the house, then the sound of digging. A motion sensor light in the yard kept going on and off. Benzler saw what appeared to be flames from a fire reflected in the canopy of the trees above the area, then he smelled smoke. The fire only lasted about a minute, and the smoke smelled like burning fabric, not wood. Benzler thought someone might be destroying evidence, so he contacted Chapman about his concerns About 15 minutes later, other officers arrived, including Chapman, Detective Marziano, and Deputy Hunt. At around 7:00 a.m., Chapman decided to attempt to contact appellant and the assembled officers went through the gate and up to the front door, while Benzler stayed by the gate and watched the yard.

Chapman testified he was the Marin County Sheriff Office's SWAT team leader on the night of the shooting. Chapman responded to the Cady residence on Indian Valley Road at about 4:00 a.m. At the back of the house a woman was tending to a man on the

[3] Appellant sought to suppress items found in his bedroom and trailer, including an expended .40 caliber casing with extractor marks consistent with those on the casing found at the scene, documents belonging to Calkins, and ammunition.

ground who had been shot. Cady told the police he recognized Calkins as one of the intruders by his voice, and Paris Stephens told them she had seen Calkins with appellant earlier that night. In this way, Calkins and appellant were identified as suspects but it was not known at that time which of the suspects fired the shot. One firearm was found at the scene but each suspect was thought to have a firearm. Chapman checked local records and found an address for appellant on Adams Street, Novato. Benzler was sent to Adams Street at about 5:10 a.m. After the call from Benzler about the suspected destruction of evidence at Adams Street, Chapman wanted to send a group of deputies over there. Lieutenant Russell initially wanted to send just one deputy but Chapman convinced him, for reasons of officer safety, the better plan was to send at least four officers. Russell ordered Chapman and the other deputies to accompany Detective Marziano, who would be the person to initiate contact. The police log showed Chapman arrived at Adams Street at 6:44 a.m.

The assembled officers approached the residence quietly on foot, forming a perimeter around the house as they went. Deputy Marziano went through the gate and Chapman came from the sidewalk, over a handrail and onto the deck where he joined Marziano. They knocked on a sliding glass door. Appellant's father answered and Marziano explained they were looking for appellant. The father said appellant was upstairs and motioned for the officers to enter. Chapman saw Marziano go upstairs to the bedroom indicated by appellant's father. There was a woman in bed (Babineaux) who said appellant wasn't in that room. Officers checked other rooms in the house but did not find appellant. After the officers left the house Marziano decided they should search a trailer parked in the driveway. Appellant was found inside the trailer.

At the suppression hearing, Marziano testified Calkins and appellant were identified as suspects through information provided by Matt Cady and Paris Stephens. Cady told Marziano that a week before appellant came to his house, accused him of stealing motorcycle parts, kicked in the door to the shed, and punched out his bedroom window. While at the Cady residence, Marziano also learned appellant was the registered owner of a .40 caliber Smith & Wesson semi-automatic handgun. Marziano

went to 201 Adams Street about 6:25 a.m. and met with Benzler. Marziano spoke with Lieutenant Russell and it was agreed police should attempt to make consensual contact with the occupants after additional officers arrived. Marziano said the need for additional officers was for officer safety. Marziano was also concerned about destruction of evidence. At some point between 6:45 a.m. and 7:00 a.m., other officers arrived, including Chapman. Marziano went through a gated entry to the driveway of 201 Adams Street. The gate was closed but not locked. There was no telephone entry system or any signs posted against trespass. Marziano went to the left towards what he thought was the front of the house, where he could see a light on through a sliding glass door. Marziano knocked on the door and Walter Clayton, appellant's father, answered in less than a minute. After Marziano told Mr. Clayton he was looking for appellant, Mr. Clayton said appellant was upstairs in his room. Mr. Clayton walked Marziano in through the kitchen to the bottom of the stairs and pointed up to the master bedroom. After failing to locate appellant upstairs, Marziano came back downstairs and asked Mr. Clayton if police could check the rest of the house. Mr. Clayton agreed. When police did not find appellant in the house, Marziano asked Mr. Clayton if he owned the trailer in the driveway. Mr. Clayton said he owned the trailer and agreed police could search it. Appellant was found inside the trailer at about 7:15 a.m. Marziano applied for a warrant to search the premises and the warrant was served at 2:05 p.m.

Walter Clayton testified at the suppression hearing that he and his wife own 201 Adams Street, and appellant was living there with them. Mr. Clayton said he was awakened by banging on the sliding glass door at the back of the house. Mr. Clayton explained they had their tract home slightly redesigned to take advantage of the views. So although the sliding glass door faced Adams Street, it was not the front door in the conventional sense. The true front door was on the other side of the house and you had to pass through two gates to reach it. Mr. Clayton said the layout can be confusing. He said that on a dozen occasions over a period of 30 days a person might come to the sliding glass doors facing Adams Street thinking it was the front door. Mr. Clayton said he is careful to keep the gates on his property closed to protect his insurance coverage for the

swimming pool. Mr. Clayton testified that after he led Marziano upstairs, he woke his wife, then went back down to the kitchen because he assumed the police would question appellant. Next, he noticed a uniformed person go upstairs and tell Marziano appellant had been found in the trailer. Marziano never asked for permission or consent to search the trailer before appellant was found. Sometime after appellant was apprehended and handcuffed, another officer asked Mr. Clayton if they could check the trailer, according to Mr. Clayton.

In ruling on the suppression motion, the trial court found Marziano credible and no evidence he was lying or prevaricating about what happened at the Clayton residence. On the other hand, the trial court found Mr. Clayton was "not particularly credible." Also, the trial court found Marziano made a legitimate entry onto the Clayton property "through a reasonably perceived public access way to their premises." Accordingly, the trial court concluded Marziano's entry into the yard was not a Fourth Amendment violation. Even if Marziano's entry into the yard violated the Fourth Amendment, the trial court concluded it was justified by probable cause to arrest appellant coupled with exigent circumstances. In addition, the trial court found the entry into the house was incontrovertibly consensual, as was the sweep of the house. The trial court also found by a preponderance of the evidence Mr. Clayton consented to an search of the trailer, and, even if he didn't, probable cause and exigent circumstances justified the search.

B. Analysis

"Our standard of review on appeal from the denial of a motion to suppress is well established. We defer to the trial court's factual findings where supported by substantial evidence, but we must exercise our independent judgment to determine whether, on the facts found, the search and seizure was reasonable under the Fourth Amendment standards of reasonableness. [Citation.]" (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1073-1074.) In reviewing for substantial evidence, "[w]e resolve neither credibility issues nor evidentiary conflicts[,]" . . . "for it is the exclusive province of the trial judge

or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Appellant contends the police entry through the gate and onto the Clayton property violated the Fourth Amendment because the Claytons exhibited a subjective expectation of privacy in the curtilage of their home—the gated and fenced-off yard area. Appellant further contends this Fourth Amendment violation was not cured by Mr. Clayton's subsequent consent to enter the house. Neither of these contentions is convincing.

We acknowledge the Claytons' fenced backyard was part of the curtilage of the residence and therefore "warrants the Fourth Amendment protections that attach to the home." (*Oliver v. United States* (1984) 466 U.S. 170, 180.) However, police with legitimate business may lawfully enter that portion of the curtilage that is impliedly open for the public to use by the normal means of access to and egress from the house, such as a sidewalk, pathway or driveway. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 629-631.) Here, police were engaged in the legitimate business of seeking to locate and interview a suspect in a murder case. Police entered the property through an unlocked gate on the side of the property facing the main public road — Adams Street — and approached what they took to be the front door of the house. Substantial evidence, notably Mr. Clayton's testimony about the confusing layout of the house and how frequently visitors come to the back door, supports the trial court's finding Marziano made a legitimate entry onto the Clayton property "through a reasonably perceived public access way to their premises." Thus, we conclude the police did not make an illegal intrusion onto the curtilage of the Clayton property.

Moreover, even if the police entry to the Clayton property was not by implied public access, and was actually an illegal trespass, it did not invalidate the consent subsequently obtained from Mr. Clayton to enter and search the house and trailer. "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation." (*United States v. Karo et al.* (1984) 468 U.S. 705, 712-713.) Rather, "[t]he touchstone of the Fourth Amendment is

reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' [Citation.]" (*United States v. Knights* (2001) 534 U.S. 112, 118-119.) In this case, police were hot on the trail of a suspect in a murder case. Police knew Cady had identified Calkins as one of the two intruders. Cady also told police he suspected the other intruder was appellant because appellant came to his home the week before, kicked a door off its hinges and broke a window. Paris Stephens told police she saw Calkins and appellant together earlier that evening. A records check showed appellant lived at 201 Adams Street. Police also identified appellant's vehicle and found it parked outside the Clayton residence with its engine still warm. Thus, police had every reason to believe appellant was on the property and to wish to question him concerning the shooting on Indian Valley Road. In sum, the police entry onto the Clayton property was needed to further the substantial governmental interest in questioning a murder suspect, while it involved a minimal intrusion on appellant's privacy interests. Therefore, even if the police committed an illegal trespass in their approach to the house, and even if such trespass constituted a "search," it was not one we are prepared to deem unreasonable under the Fourth Amendment. (Cf. *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 361 [noting officer's trespass in defendant's backyard was "'marginally relevant,' but not conclusive, in determining whether the ultimate seizure of the contraband was reasonable" [citation]"].)[4]

[4] Appellant does not dispute that after traversing the curtilage, police entered the house and searched both the house and trailer with his father's consent.

DISPOSITION

The judgment is affirmed.

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Parrilli, J.

We concur:

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McGuiness, P. J.

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Siggins, J.